

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DOROTHY N. BUIE)	
Claimant)	
VS.)	
)	
BEVERLY ENTERPRISES)	Docket No. 166,432
Respondent)	166,433 & 166,434
AND)	
)	
TRAVELERS INSURANCE COMPANY)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Claimant appealed the Award entered by Assistant Director Brad E. Avery dated May 29, 1996. The Appeals Board heard oral argument on October 17, 1996.

APPEARANCES

Claimant appeared by her attorney, Chris Miller of Lawrence, Kansas. Respondent and its insurance carrier appeared by their attorney, Kenneth J. Hursh of Overland Park, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, J. Paul Maurin III of Kansas City, Kansas. There were no other appearances.

RECORD

The Appeals Board considered the record listed in the Award. In addition, contained in the record and not specifically listed by the Assistant Director was the independent medical examination report of Fred A. Rice, Jr., M.D., dated October 26, 1994.

STIPULATIONS

The Appeals Board adopted the stipulations listed in the Award. The Kansas Workers Compensation Fund was impleaded in only Docket No. 166,434 with a date of accident of October 10, 1991. The respondent and the Fund entered into a stipulation dated March 4, 1996, wherein the Fund agreed to pay 62.5 percent of the award and costs entered in Docket No. 166,434.

ISSUES

Claimant requested Appeals Board review of the following issues:

Docket No. 166,433

- (1) The nature and extent of claimant's disability.

Docket No. 166,434

- (2) The nature and extent of claimant's disability.
- (3) The proper application of the K.S.A. 44-510a (Ensley) credit.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing arguments of the parties, the Appeals Board finds as follows:

Three separate claims for compensation benefits were presented by the claimant for decision. The parties stipulated the claimant sustained work-related injuries on each of the dates alleged. The date of the first accident was March 17, 1989, when claimant hurt her low back while lifting a patient at work. The Assistant Director found claimant failed to serve a timely written claim on the respondent in regard to that accident and, therefore, the claim was barred pursuant to K.S.A. 44-520a (Ensley). The claimant did not appeal that decision. The second claim was for a date of accident of November 24, 1989, when claimant fell at work injuring her left knee, both hands, and lower back. The third claim was for another injury to the claimant's lower back which occurred while claimant was again lifting a patient on October 10, 1991. Claimant appealed both Docket No. 166,433

with a date of accident of November 24, 1989, and Docket No. 166,434 with a date of accident of October 10, 1991.

The Assistant Director found claimant was entitled to permanent partial general disability benefits in Docket No. 166,433 in the amount of 15.6 percent based on Dr. Fred Rice, Jr.'s opinion as a result of a court ordered independent medical examination contained in a report dated October 26, 1994. In regard to Docket No. 166,434, the Assistant Director awarded claimant permanent partial general disability benefits in the amount of 1.4 percent again based on Dr. Rice's independent medical examination and report. The Assistant Director applied an 80 percent credit pursuant to K.S.A. 44-510a (Ensley) against the 7 percent permanent functional impairment that Dr. Rice attributed to claimant's back injury of October 10, 1991, to arrive at the 1.4 percent award.

Claimant argued the record supported an award in Docket No. 166,433 for permanent partial general disability benefits of 10 percent based on permanent functional impairment ratings of Edward J. Prostic, M.D. Dr. Prostic examined and rated the claimant at the request of claimant's attorney.

In regard to Docket No. 166,434, claimant argued she was not employed at a comparable wage and, therefore, she was eligible for a work disability award.

Respondent agreed with the Assistant Director that both disability awards should be based on permanent functional impairment ratings. However, respondent argued that the Assistant Director erred when he awarded the claimant 15.6 percent in Docket No. 166,433. The respondent contended the appropriate award for this docket would be 8.1 percent. With respect to Docket No. 166,434, the respondent agreed with the Assistant Director that the appropriate award was 1.4 percent.

The Appeals Board agrees with the Assistant Director that the award in both docket numbers should be limited to permanent functional impairment. The Assistant Director found the respondent returned claimant to work at a comparable wage post injury. Thereafter, claimant was terminated for reasons not related to her work-related injuries. The Appeals Board also agrees with the Assistant Director's conclusion that the independent medical report of Dr. Rice was the most credible medical evidence contained in the record and should be the basis for permanent partial disability benefits based on functional impairment. Dr. Rice was the only physician who apportioned functional impairment ratings according to the date of each accident and issued separate ratings for the low back and upper extremities.

The Appeals Board, however, for the following reasons, finds the Assistant Director's award of permanent partial general disability benefits based on permanent functional impairment should be modified for each date of accident. The Appeals Board agrees with the Assistant Director that the respondent and the Fund are entitled to a K.S.A. 44-510a (Ensley) credit for claimant's third back injury contained in Docket No. 166,434.

However, the Appeals Board concludes the K.S.A. 44-510a credit was incorrectly applied by the Assistant Director.

Dr. Rice opined that claimant had sustained a total of 7 percent permanent functional impairment to her low back as a result of her three separate work-related accidents. Dr. Rice apportioned the 7 percent rating between the three accidents as follows: 20 percent to the March 17, 1989, accident; 30 percent to the November 24, 1989, accident; 50 percent to the October 10, 1991, accident. Dr. Rice further opined that the claimant's bilateral upper extremity injuries that occurred as a result of the November 24, 1989, accident amounted to 5 percent functional impairment to the claimant's left upper extremity and 5 percent functional impairment to the claimant's right upper extremity. Dr. Rice combined the upper extremity ratings with the low back rating for a total of 13 percent permanent functional impairment to the body as a whole. Although Dr. Rice did not make a specific finding as to a separate body as a whole permanent functional rating for the claimant's bilateral upper extremity injuries, such can be easily ascertained by subtracting the 7 percent low back functional impairment rating from the total 13 percent rating leaving a 6 percent whole body functional impairment rating.

Docket No. 166,433

(1) The Appeals Board concludes the appropriate functional impairment rating that applies to claimant's low back injury as a result of the November 24, 1989, accident would be 3.5 percent. The total functional impairment rating for the November 24, 1989, accident would be 9.5 percent which would include the 6 percent functional impairment rating for claimant's bilateral upper extremity injuries. The 3.5 percent functional impairment rating for the low back includes the 1.4 percent that Dr. Rice apportioned to the March 17, 1989, accident which was determined not compensable because of failure to file a timely written claim. However, the workers compensation law that existed for accidental injuries occurring prior to July 1, 1993, did not provide for a reduction in benefits for preexisting disability. The worker was entitled to the full amount of the disability that resulted from an accidental injury regardless of his or her preexisting disability. See Baxter v. L.T. Walls Constr. Co., 241 Kan. 588, 738 P.2d 445 (1987). Accordingly, both the functional impairment apportioned for the March 17, 1989, low back injury of 1.4 percent and the functional impairment apportioned for the November 24, 1989, low back injury of 2.1 percent are combined for a 3.5 percent functional impairment resulting from claimant's low back injury of November 24, 1989. Claimant's upper extremity injuries resulted in a 6 percent whole body functional impairment rating which then is combined with the 3.5 percent rating to the low back entitling claimant to a 9.5 percent permanent partial disability benefit resulting from the November 24, 1989, accident.

Docket No. 166,434

(2)(3) As previously noted, the October 10, 1991, accident resulted in another injury to claimant's low back. Therefore, the Appeals Board finds the claimant is entitled to

permanent partial general disability benefits based on Dr. Rice's functional impairment rating of 7 percent to the body as a whole. The 7 percent permanent partial disability benefit for the October 10, 1991, accident is then subject to K.S.A. 44-510a (Ensley) credit of 3.5 percent that was actually paid for as a result of the November 24, 1989, accident. The 3.5 percent credit does not apply to the temporary total disability weeks paid and the credit terminates on the date the prior disability terminates. As shown in the calculation of the award below, claimant will receive permanent partial disability benefits at the reduced rate of \$7.66 for the overlapping weeks that the credit applies and then at the unreduced rate of \$12.49 per week.

The Appeals Board adopts and incorporates the findings and conclusions of the Assistant Director as set forth in his Award to the extent they are not inconsistent with the findings and conclusions expressed in this Order.

AWARD

Docket No. 166,433

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Assistant Director Brad E. Avery dated May 29, 1996, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Dorothy N. Buie, and against the respondent, Beverly Enterprises, and its insurance carrier, Travelers Insurance Company and the Kansas Workers Compensation Fund, for an accidental injury which occurred on November 24, 1989, and based upon an average weekly wage of \$207.19.

Claimant is entitled to 43 weeks temporary total disability at the rate of \$138.13 per week or \$5,939.59, followed by 372 weeks at the rate of \$13.12 per week or \$4,880.64 for a 9.5% permanent partial general disability making a total award of \$10,820.23.

As of November 20, 1996, there is due and owing claimant 43 weeks of temporary total disability compensation at the rate of \$138.13 per week or \$5,939.59, followed by 321.71 weeks of permanent partial disability compensation at the rate of \$13.12 per week for a total due and owing of \$10,160.43, which is ordered paid in one lump sum less any amounts previously paid. Thereafter the remaining balance of \$659.80 is to be paid for 50.29 weeks at the rate of \$13.12 per week, until fully paid or further order of the Director.

AWARD

Docket No. 166,434

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Assistant Director Brad E. Avery dated May 29, 1996, should be, and hereby is, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Dorothy N. Buie, and against the respondent, Beverly Enterprises, and its insurance carrier, Travelers Insurance Company and the Kansas Workers Compensation Fund for an accidental injury which occurred on October 10, 1991, and based on an average weekly wage of \$267.70.

Claimant is entitled to permanent partial disability benefits at a reduced rate of \$7.66 per week for 317.14 weeks or \$2,429.29, plus permanent partial disability benefits at an unreduced rate of \$12.49 per week for 97.86 weeks or \$1,222.27, for a 7% permanent partial general disability, making a total award of \$3,651.56.

As of November 20, 1996, there is due and owing the claimant 266.86 weeks of permanent partial disability compensation at the reduced rate of \$7.66 per week for \$2,044.15 total due and owing which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$1,607.41 shall be paid at the reduced rate of \$7.66 per week for 50.28 weeks or \$385.14, followed by 97.86 weeks paid at the unreduced rate of \$12.49 per week until fully paid or further order of the Director.

Future medical benefits shall be awarded only upon proper application to and approval of the Director.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

Pursuant to the stipulation between the respondent and the Kansas Workers Compensation Fund, the Kansas Workers Compensation Fund is liable for 62.5% of all the costs and the award.

All fees and expenses are hereby assessed to the respondent and the Kansas Workers Compensation Fund per the stipulation to be paid direct as follows:

Hostetler & Associates, Inc.

Transcript of Preliminary Hearing	\$196.90
Transcript of Preliminary Hearing	138.25
Deposition of Donald VanderVegt, M.D.	158.65
Deposition of Edward Prostic, M.D.	125.50
Deposition of David Tillema, M.D.	136.00

Richard Kupper & Associates

Transcript of Regular Hearing
Transcript of Motion Hearing

Unknown
136.40

IT IS SO ORDERED.

Dated this ____ day of November 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris Miller, Lawrence, KS
Kenneth J. Hursh, Overland Park, KS
J. Paul Maurin III, Kansas City, KS
Alvin E. Witwer, Administrative Law Judge
Brad E. Avery, Assistant Director
Philip S. Harness, Director